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No. _____

Supreme Court, U.S.
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In the

Supreme Court of the United States

October Term, 1991

THE DULUTH, WINNIPEG & PACIFIC RAILWAY COMPANY, a Minnesota corporation,

Petitioner,

v.

KYLE SMALLEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

1. Does the Seventh Amendment guarantee of a jury trial permit a reviewing court to reweigh the evidence of record in a manner which is contrary to the findings and determination of the Jury and the Trial Court, both of which have heard the testimony and evaluated the credibility of the witnesses at trial?

2. Where a jury instruction correctly states the law when read as a whole, is a reviewing court permitted to isolate two sentences from that instruction, evaluate them as if they were the entirety of the instruction and grant a new trial based on its finding of error?

PARTIES

All parties to this Petition are listed in the caption. The Duluth, Winnipeg and Pacific Railway Company is a wholly-owned subsidiary of Grand Trunk Corporation, a Delware corporation. Grand Trunk Corporation is a wholly-owned subsidiary of Canadian National Railroad, a Crown corporation.

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v.

KYLE SMALLEY,

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PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Petitioner, the Duluth, Winnipeg and Pacific Railway Company prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this matter.

OPINIONS BELOW

The District Court's Order and Memorandum decision denying Respondent's motion for a new trial (Appendix A) was not officially published. The decision of the U.S. Eighth Circuit Court of Appeals from which certiorari is sought (Appendix B) is reported at 940 F.2d 296 (1991). The Order of the Court of Appeals for the Eighth Circuit which denies Petitioner's Petition for Rehearing with suggestion for rehearing en banc (Appendix C) is not officially published.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit's decision and judgment was entered on July 22, 1991. The Court's Order denying Petitioner's timely Petition for Rehearing with

suggestion for rehearing en banc was entered on September 6, 1991. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment of the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, other than according to the rules of common law.

STATEMENT OF THE CASE

A. Facts Material to the Consideration of the Question Presented.

Kyle Smalley (hereinafter "Smalley") commenced this personal injury action against the Duluth, Winnipeg and Pacific Railway Company (hereinafter "DWP") under the provisions of the Federal Employers'

Liability Act. 45 U.S.C. § 51 et. seq. Jurisdiction of the District Court was founded on 45 U.S.C. § 56 (1988).

Smalley claims that he suffered injuries in a work-related accident on July 11, 1985, while employed by the DWP as a switchman. At the time of the accident, he was stepping off of a slow moving train when he slipped and fell, injuring his left knee.

Smalley claimed that this injury, coupled with his age, intellectual limitations and eleventh grade education, disqualified him from employment at anything more than a menial job. On the other hand, the DWP contended that Smalley could work and earn a wage comparable to his pre-injury wage. Further, the DWP contended that Smalley

had been offered but refused such positions.

The matter was tried on April 17 through 26, 1990, before the Honorable Donald D. Alsop, Chief Judge of the United States District Court, District of Minnesota. During the trial, the Jury heard substantial conflicting testimony regarding the nature and extent of Smalley's injuries. The Jury also was called upon to resolve evidentiary conflicts as to Smalley's physical limitations and employment prospects.

For example, in contradiction of Respondent's claim of general unemployability, Charles Wollack, the DWP's Director of Administration and Claims, testified that, following the accident, Smalley was offered special light duty work by the DWP. He worked

for several days as a van driver and in the roundhouse. The DWP also offered Smalley a job as an "engine man" and offered to retrain him. Smalley, however, refused all efforts at alternative work or retraining, stating that "if he could not be . . . a train man . . . he was not desirous of any other position with the railroad."

Further, the DWP offered to arrange for an evaluation of Smalley's vocational abilities in order to assist him in finding suitable alternative employment. Smalley refused that proposal as well. Moreover, although both physicians that testified at trial placed restrictions on Smalley, they agreed that "there's no reason that Smalley can't be involved in productive and daily work activities . . . as long as he stays

within the restrictions." Indeed, Smalley advised the jury that, following his employment at the DWP, he did not work at any job for more than one week and, by stipulation of the parties, the jury was informed that, during the period from 1985 to the time of trial, Smalley had earned a total of $2,948.00 in employment income.

The jury also heard testimony from Dee Koskela, a rehabilitation consultant who evaluated Smalley at the request of his attorney. Ms. Koskela testified that, based on her analysis of his test results, Smalley had limited intellectual ability. She also testified, however, that at least one of the tests disclosed that Smalley was exaggerating his symptoms in an attempt to present himself in an unfavorable light.

Further, Ms. Koskela testified that on November 17, 1989, she asked the DWP about possible employment for Smalley, and she was told that there were no jobs available. DWP management employees later explained that the DWP was decreasing the number of its employees and, at the time Ms. Koskela inquired, the DWP was not hiring any additional staff.

During summation, counsel for Smalley asked the jury to use $36,000.00 per year until the year 2001 as a floor in calculating lost wages. This figure was derived from the Collective Bargaining Agreement which guaranteed that salary to any employee who lost a job because of the DWP's recent relocation of its operations from Minnesota to Wisconsin. There was no

evidence of record that Smalley would not qualify for those benefits.

During trial, Smalley claimed damages for lost past and future earnings of $919,767.00 based on the calculations of Dr. Egge, an economist. However, Dr. Egge's credibility was called into question when, on cross-examination, Dr. Egge admitted that his calculations did not take into account employment opportunities Respondent may have had but refused. Further, he assumed that Smalley would continue to work for the railroad until age 65, without taking into consideration Smalley's education background, his capacity for retraining, or other economic factors which would impact adversely on his continued employment with the railroad. Dr. Egge testified that his calculation of wage

loss took into consideration the income Smalley would be able to earn in the future. This testimony, notably presented by Smalley during his case-in-chief, required the jury to consider the issue of mitigation of damages.

At the April 24, 1990 Charge Conference, the instruction on mitigation of damages was presented and discussed. The instruction read as follows:

> With respect to loss of earnings in the past, you are instructed that if plaintiff could have worked in the past but did not, you must not award him damages for loss of earnings for the period of time during which he might have worked. The issue in this respect is not whether plaintiff did work but whether or not he could have worked during all or any part of the time in question.
>
> If you find that he could have worked, but at a lesser salary, because of his injury, his damages must be limited to the

> difference between the salary he might have earned and the greater amount which he could have earned if he had not been injured.
>
> Similarly, with respect to future loss of earnings, you are instructed that if plaintiff is able to work in the future, you must not award him damages for future loss of earnings. However, if plaintiff is able to work in the future, but his earnings will be diminished because of his injury, he is entitled to recover the difference between the lesser salary he might earn and the greater amount which he could have earned if he had not been injured. The burden of proving that plaintiff could have worked in the past or will be able to work in the future is on the defendant.

After thoroughly considering the matter, the District Court ruled that the proposed instruction was an accurate statement of the law. It also ruled that the DWP was entitled to the requested instruction.

On April 26, 1990, the jury returned a verdict in favor of Respondent for $85,100.00.[1]

[1]The jury was asked to answer only four questions:

1. Was the Duluth, Winnipeg and Pacific Railway negligent?
   Yes
2. Did the negligence of the Duluth, Winnipeg and Pacific Railway Company have some causal connection with Kyle Smalley's injuries?
   Yes
3. Was Kyle Smalley negligent?
   No
4. What amount do you find, without any reduction for any negligence which you may find on the plaintiff's part, will fairly and adequately compensate the plaintiff for the injuries he received?
   $85,100.00

Notably, the jury was not asked to apportion damages. Thus, it is impossible to determine, from the lump sum awarded, the amount awarded for any single item of damages, including past and/or future wage loss.

Judgment was entered on April 30, 1990. Smalley moved for a new trial on damages alleging that, because the first paragraph of the instruction on mitigation of damages was not a full statement of the law, the jury was confused into awarding an inadequate amount of damages. The Trial Court, having reviewed and evaluated the credibility of the witnesses at trial, denied Smalley's motion for a new trial on June 14, 1990, and Smalley appealed on July 11, 1990.

The Court of Appeals for the Eighth Circuit reversed the Trial Court's denial of Smalley's motion for a new trial. The Court reviewed the contested evidence of record and ruled that, although the jury awarded Smalley $85,100.00, that verdict was "inadequate" and not supported by the

evidence. The Court concluded that the evidence established that Smalley was permanently and totally disabled from future employment and thus, the verdict did not adequately compensate Smalley for his resulting future wage loss. The Court inferred that such inadequacy resulted because the jury was confused by the Court's instruction on mitigation of damages because, although the instruction as a whole correctly stated the law, the first paragraph of that instruction was incomplete. The Court then reversed and remanded to the District Court for a new trial on damages. The Order was entered on July 30, 1991. Petitioner timely petitioned for rehearing and on September 6, 1991, the Court of Appeals entered its Order denying rehearing, with

four Judges indicating their interest in having a rehearing granted.

REASONS FOR GRANTING THE PETITION

Introduction

The Seventh Amendment preserves the common law right of trial by jury in actions at law and insures the vitality of that right by forbidding the reexamination in any court of the United States of any fact tried by a jury, other than "according to the rules of the common law." Appellate courts in the federal system are thereby prohibited from reviewing any factual issue, including the quantum of a verdict, if it has been decided by a jury and sustained by the Trial Court. Parsons v. Bedford, 3 Pet. 433, 447, 448, 7 L.Ed. 732, 736 (1830); Arkansas Cattle Co. v. Mann, 130 U.S. 69, 75, 9 S.Ct. 458, 32 L.Ed. 854,

856 (1888); Fitzgerald Const. Co., v. Fitzgerald, 137 U.S. 98, 113, 11 S.Ct. 36, 34 L.Ed. 608, 614 (1890); Herencia v. Guzman, 219 U.S. 44, 45, 31 S.Ct. 135, 55 L.Ed. 81, 82 (1910); Southern Ry. Co. v. Bennett, 233 U.S. 80, 87, 34 S.Ct. 566, 58 L.Ed. 860, 863 (1913); St. Louis & S. R. Co. v. Craft, 237 U.S. 648, 661, 35 S.Ct. 704, 59 L.Ed. 1160, 1165 (1914); Louis & Nash. R. Co. v. Holloway, 246 U.S. 525, 529, 38 S.Ct. 379, 62 L.Ed. 867, 870 (1917); Fairmount Glass Works v. Cub Fork Coal Co., 287 U.S. 474, 481, 482, 485, 53 S.Ct. 252, 77 L.Ed. 439 (1933); U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 248, 60 S.Ct. 811, 856, 84 L.Ed. 1129 (1940).

In the case at bar, the Court of Appeals for the Eighth Circuit, in direct contravention of the dictates of the

Seventh Amendment, has examined the record, ruled on the credibility of witnesses and reversed the Trial Court's denial of a new trial. Because the Court of Appeals has decided a federal question in a way which conflicts with a long line of Supreme Court precedent, the Court should grant Petitioner's Petition.

Further, although the Seventh Amendment's bar to Appellate Court review of a trial court's rulings on the sufficiency of the evidence is well established, the Supreme Court has not directly addressed this issue since 1933. See, Fairmount Glass Works v. Cub Fork Coal Co., supra. Since that time, conflicting rulings plague the Circuit Courts of Appeal with several circuits permitting Appellate review of jury verdicts using an "abuse of discretion"

standard. The Court has three times granted review of this issue but because it could dispose of the case on other issues, found it unnecessary to rule on the constitutional question. See, Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 279, 109 S.Ct. 2909, 106 L.Ed.2d 219, 240-241 (1989); Gruenthal v. Long Island R. Co., 393 U.S. 156, 89 S.Ct. 331, 21 L.Ed.2d 309 (1968); Neese v. Southern R. Co., 350 U.S. 77, 76 S.Ct. 131, 100 L.Ed. 60 (1955). The time is now ripe for the Supreme Court to directly address this issue, especially in light of the conflict existing in the United States Circuit Courts of Appeals.

Finally, the Supreme Court should grant review because, in ruling that the jury instruction on mitigation of damages

was in error, the Court of Appeals so far departed from the accepted and usual course of justice so as to call for an exercise of the Supreme Court's supervisory powers.

I.

THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT VIOLATED PETITIONER'S SEVENTH AMENDMENT RIGHT TO A JURY TRIAL WHEN IT REVERSED THE TRIAL COURT'S DENIAL OF SMALLEY'S MOTION FOR A NEW TRIAL.

The right to a jury trial in civil cases is a basic and fundamental feature of our system of federal jurisprudence and is protected by the Seventh Amendment. Jacob v. New York, 315 U.S. 752, 62 S.Ct. 854, 86 L.Ed. 1166 (1941). At the time of its adoption, the only method of reviewing facts tried by a jury was by a motion for a new trial presented

to the trial court and the trial court's ruling on the motion was not reviewable on appeal. Parsons v. Bedford, 3 Pet.(U.S.) at 448, 7 L.Ed. 737 (1933). Accordingly, the Supreme Court has consistently ruled that a trial judge's action in granting or denying a new trial is a matter of absolute discretion and cannot be reviewed on appeal. Fairmount Glass Works v. Cub Fork Coal Co., supra.

> The rule that this Court will not review the action of a federal trial court in granting or denying a motion for a new trial for error of fact has been settled by a long and unbroken line of decisions [citations omitted]; and has been frequently applied where the ground of the motion was that the damages awarded by the jury were excessive or were inadequate. [citations omitted]. The rule precludes likewise a review of such action by a circuit court of appeals. Fairmount Glass Works, 287 U.S. at 481 & n. 3,

53 S.Ct. at 254, 77 L.Ed. at 453.

See also, U.S. v. Socony-Vacuum Oil Co., supra, wherein the Supreme Court stated:

> This case falls within the well established rule that neither this Court nor the Circuit Court of Appeals will review the action of a federal trial court in granting or denying a motion for a new trial for error of fact, since such action is a matter within the discretion of the trial court. . . . Certainly, denial of a motion for a new trial on the grounds that the verdict was against the weight of the evidence would not be subject to review. Id., 310 U.S. at 238, 60 S.Ct. at 856, 84 L.Ed. at 1181.

The case at bar falls squarely within this rule and the Court should grant the within Petition for a Writ of Certiorari. Although articulated as a ruling on an erroneous jury instruction, in reality the Court of Appeals' reversal of the District Court's denial of a new

trial was a reweighing of the sufficiency of the evidence. And, in reweighing the evidence, the Court of Appeals reached a conclusion which was substantially and directly at odds with the determinations of the Jury and of the District Court, both of which had the opportunity to listen to the testimony and judge the credibility of the witnesses.

In ruling on the motion for a new trial, the District Court stated:

> Plaintiff's first argument is that the damage evidence at trial was uncontroverted that the plaintiff could not return to his job at the railroad and that the only alternative employment he could obtain would be at a minimum wage entry level position. As a result, he suffered a great deal of lost wages alone, and it was impossible for the jury to arrive at such a small damage figure. This contention is not entirely accurate. Defendant introduced evidence that it made plaintiff a job

> offer of a light duty position, a possible engineer position, and an offer for vocational retraining, but that plaintiff refused these offers. Defendant argued that if these offers had been accepted by plaintiff he would have returned to full gainful employment within one year after the date of the accident.
>
> This being the case, the jury had before it evidence which allowed it to decide damages within a large range. Defendant argued for a very low damage figure and plaintiff requested over a million dollars. Such a dispute is a classic question for resolution by a jury. The court is satisfied that after seeing and hearing all witnesses, including plaintiff himself, that the jury's damage determination was supported by the evidence adduced at trial.
>
> [Appendix at pages 16 and 17, emphasis supplied.]

Notably, the District Court, empowered with constitutional authority to do so, reweighed the evidence on damages with the additional insights of having

seen and heard each of the witnesses who testified at trial and thereafter concluded that the Jury's verdict was proper. Such a determination of a District Court is to be accorded great deference and cannot be re-examined on appeal.

In the case at bar, however, it is obvious from its opinion that the Court of Appeals for the Eighth Circuit reviewed the controverted record and formed its own conclusions on the issues which had already been decided by both the jury and the Trial Court.

> On this basis, we have reviewed the verdict in light of the parties' contentions, the evidence, and the entire charge. . . . We find the overwhelming medical evidence supports Smalley's disability and inability to work. the railroad's suggestion that Smalley could have worked is nothing more than a suggestion.

> Although the jury was entitled to weigh all of the evidence, a reading of the record establishes there is little evidence to find that Smalley could have been retrained for other employment or that he was capable of working at other jobs. The inadequacy of the verdict strongly suggests that the jurors believed that since he could have worked or been retrained for another job, he was entitled to no compensatory damages. 940 F.2d at 298-299.

Thus, the Court of Appeals took it upon itself to reweigh the conflicts in the evidence and make a de novo determination of what the verdict ought to have been had the Court of Appeals been the Jury. Such action is in direct conflict with the dictates of the Supreme Court and denied Petitioner its Seventh Amendment right to a jury trial.

It is possible that the Court of Appeals itself was misled by the recent trend in the Circuits to review a

District Court's rulings on motions for a new trial under the guise of an "abuse of discretion" standard. The Fourth, Fifth and Sixth Circuits have now approved reversal of a trial court's denial of a motion for a new trial on the basis that the trial court abused its discretion. In so holding, those Circuits have sanctioned Appellate review of factual issues, in effect, authorizing the Courts of Appeals to act as a new, independent fact finder. See, Abasiekong v. City of Shelby, 744 F.2d 1055, 1059 (4th Cir. 1984) (Court of Appeals reversed Trial Court's order granting a new trial on the grounds that the Court abused its discretion); Franks v. Associated Air Center, Inc., 663 F.2d 583 (5th Cir. 1981) (Tenth Circuit Court of Appeals ruled that the evidence did not support

the jury's damage award and it remanded for a new trial after stating that the Trial Court's refusal to grant such a new trial was an abuse of discretion); Moran v. Johns-Manville Sales Corp., 691 F.2d 811 (6th Cir. 1982) (after reviewing the record, the Court ruled that the Trial Court did not abuse its discretion in denying motion for a new trial).

On the other hand, the Second, Third and Eighth Circuits have explicitly rejected such power and have upheld the sanctity of the Seventh Amendment by affirming that a Court of Appeals cannot review a trial court's grant or denial of a motion for a new trial. See, Compton v. Luckenbach Overseas Corporation, 425 F.2d 1130, 1132 (2d Cir. 1970) (Court of Appeals may not set aside Trial Judge's determination regarding sufficiency of

the evidence to support a jury verdict); Portman v. American Home Products Corp., 201 F.2d 847, 848 (2d Cir. 1953) (L. Hands, J.) (Appellate Court cannot review Trial Court's denial of a motion for a new trial based on the weight of the evidence); Silverii v. Kramer, 314 F.2d 407, 413 (3rd Cir. 1963) (the grant or denial of a motion for a new trial is a matter which rests within the sound discretion of the Trial Judge and his action is not reviewable upon appeal, save in the most exceptional cases); Green v. American Airlines, Inc., 804 F.2d 453, 455 (8th Cir. 1986) (ordinarily no error can be predicated on a trial court's denial of a motion for a new trial on the ground that the verdict is against the weight of the evidence because of the serious Seventh Amendment

questions that arise when an Appellate Court reverses a Trial Court's determination on this issue); Chohlis v. Cessna Aircraft Co., 760 F.2d 901, 906 (8th Cir. 1985) (even an abuse of discretion is not sufficient to justify Appellate Court reversal of a Trial Court's ruling on the sufficiency of the evidence to support a jury's verdict).

Such confusion among the Circuits underscores the importance of granting Supreme Court review in the instant case. The Supreme Court has granted certiorari three times in recent years in order to address this issue but disposed of all three cases on other grounds. See, Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., supra; Gruenthal v. Long Island R. Co., supra; and Neese v. Southern R. Co., supra. A

definitive decision from the Supreme Court on this issue is desirable, and Petitioner respectfully requests that a Writ of Certiorari issue in the present case to address this important issue.

II.

JURY INSTRUCTIONS ARE TO BE CONSTRUED AS A WHOLE AND THE COURT OF APPEALS ERRED IN RULING ON TWO ISOLATED SENTENCES OF AN INSTRUCTION WITHOUT CONSIDERATION OF THOSE SENTENCES WITHIN THE CONTEXT OF THE ENTIRE INSTRUCTION.

As part of its charge to the jury, the Trial Court gave a three paragraph instruction on mitigation of damages. However, the Court of Appeals chose to separate the first two sentences of that instruction and judge them as if they stood alone. A single erroneous instruction does not require reversal if

the error was cured by a subsequent instruction or by consideration of the entire charge. Wright v. Farmers Co-Op of Arkansas, 626 F.2d 694, 697 (8th Cir. 1980).

Here, the contested instruction, when properly considered as an integrated whole, correctly states the law on mitigation of damages. The law clearly permits an injured person to recover the difference between what he could reasonably have been expected to make without the injury and what he could reasonably be expected to make with the injury during the period of time in which he could reasonably be expected to remain in the work force. Jones & Laughlin Steel Corp. v. Pfeifer, 462 U.S. 523, 103 S.Ct. 2541, 76 L.Ed.2d 768 (1983). This is precisely the rule of law which is

expressed in the Trial Court's instruction to the jury. Notably, the jury was directed to consider the instructions in the context of the entire charge and the jury had the full text of all instructions with them in the jury room throughout their deliberations. As a consequence, the jury did not have to rely on memory alone, but were free to refer to the written language of the instructions as a whole.[2]

To reach a result contrary to that of the Trial Court, the Court of Appeals

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[2]The Court of Appeals noted that the Jury asked the Trial Court two questions which were not answerable on the basis of the evidence of record. 790 F.2d at 297, n.1. Notably, despite having the Jury Instructions in its possession during its deliberations, the Jury was not so confused as to question the Court on the issue of mitigation as it had questioned the Court on unrelated damage issues.

conclusively presumed that it was "undisputed" that the contested instruction was "obvious error." 790 F.2d at 297. In actuality, what was "undisputed" by the District Court below was that the first portion of the Instruction was not a complete statement of the law. That portion of the instruction required additional clarification which was provided by the remainder of the instruction. When properly considered as an integrated whole, the instruction clearly and accurately stated the law on mitigation of damages and the Court erred in remanding for a new trial.

No jury instruction could withstand the dissection the Court of Appeals has imposed here. Under the Court's reasoning, the Trial Court must now parse

a jury's charge and if any sentence, clause or phrase should fail to express the full panoply of the law, the instruction as a whole must be deemed erroneous.

There is no legitimate basis, in logic or in the law, to randomly single out a single paragraph for criticism in total disregard for the integrated paragraphs which follow, and then to assert that the single paragraph is not a full statement of the law. If such criticism is permitted, then the rule requiring instructions to be considered in context and as a whole would be rendered meaningless and the courts would be inundated with a multitude of claims that a given word, sentence or paragraph was not an adequate statement of the law despite the fact that the law was fully

explicated by adjoining words, sentences and paragraphs.

Further, if permitted to stand, the Court's decision would create a conflict between two United States Circuit Courts of Appeal as to the appropriate instruction on mitigation of damages. Recently, the United States Court of Appeals for the Sixth Circuit upheld a similarly worded instruction. Jones v. Consolidated Rails Corporation, 800 F.2d 590, 594 (6th Cir. 1986).[3] In this

[3]The instruction in that case read:

> Impairment of earning capacity is to be distinguished from loss of wages and earnings. Impairment in earning capacity means the diminished ability by reason of physical incapacity or impairment of a person to obtain work or earn money which said person would otherwise be

(Footnote Continued)

federal system which emphasizes conformity of decisions on federal questions, it is impermissible for two Circuits to reach mutually inconsistent and totally opposite decisions. When

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(Footnote Continued)

> able to [d]o but for the physical incapacities or impairments resulting from the injuries.
>
> An injured party is under a legal obligation to mitigate his damages, that is, to minimize the economic loss resulting from his injury, by resuming gainful employment as soon as such can be reasonably done, if such is available. If he does not resume available employment even though he is physically able to do so, such person may not recover damages for earnings lost after the date on which he was or reasonably could have been able to return to some form of gainful employment to the extent that such damages could have been mitigated.

such an event occurs, the Supreme Court should grant review and re-establish uniformity.

CONCLUSION

A long line of Supreme Court precedent clearly establishes that the Seventh Amendment forbids a reviewing court from re-examining facts tried by a jury and upheld, through a motion for a new trial, by the Trial Court. The founders of the Constitution intended that only the jury and the judge before whom the matter was tried make factual determinations. The Court of Appeals has substantially departed from this standard and has taken it upon itself to re-examine the evidence and reassess the witnesses' credibility. Such an action cannot permissibly be allowed to stand in

the face of the Seventh Amendment guarantee of a jury trial.

Further, the Circuit Courts of Appeal are in conflict and some have begun to depart from well-established constitutional principles. The Supreme Court should grant review in order to provide guidance to the Circuits and to reaffirm the sanctity of the Seventh Amendment.

Finally, the Court of Appeals erred in its ruling on the mitigation of damages instruction. The instruction, when considered as an integrated whole, properly states the law on the issue. A party is not entitled, merely because a jury does not reach the desired verdict, to manufacture error where none exists.

For the foregoing reasons, Petitioner respectfully requests that the

Supreme Court grant its Petition for a Writ of Certiorari to review the decision of the Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
FIFTH DIVISION

Kyle Smalley, 5-88 CIV 23

Appellant,

vs. ORDER

The Duluth, Winnipeg & Pacific Railway Company, etc.,

Appellee.

This Federal Employee Liability Act ("FELA") suit was tried before the undersigned and a jury commencing on April 17, 1990, and concluded with a verdict on April 26, 1990. The jury found that the Railroad was 100 percent negligent and awarded plaintiff $85,100.00. On April 30, 1990, judgment was entered accordingly. The matter is

now before the court on plaintiff's motion for a new trial as to the amount of damages.

Plaintiff bases this motion on two grounds. First, he argues that the evidence cannot support the damage award made by the jury. Second, he argues that the jury's erroneous damage figure may have been a result of defendant's requested jury instruction number 33. The court finds neither of these reasons meritorious and plaintiff's motion for a new trial will be denied.

The granting of a new trial rests within the sound discretion of the district Court. Allied Chemical Corp. v. Daiflon, Inc., 449 U.S. 33, 36 (1980). However, a jury verdict is not to be disturbed unless it is against the "clear," "overwhelming," or "great"

weight of the evidence. See, Stafford v. Neurological Medicine, Inc., 841 F.2d 470, 474 (8th Cir. 1987); McBryde v. Carey Lumber Co., 819 F.2d 185, 189 (8th Cir. 1987); and Goldsmith v. Diamond Shamrock Corp., 767 F.2d 411, 416 (8th Cir. 1985).

Plaintiff's first argument is that the damage evidence at trial was uncontroverted that the plaintiff could not return to his job at the railroad and that the only alternative employment he could obtain would be at a minimum wage entry level position. As a result, he suffered a great deal of lost wages alone, and it was impossible for the jury to arrive at such a small damage figure. This contention is not entirely accurate. Defendant introduced evidence that made plaintiff a job offer of a light duty

position, a possible engineer position, and an offer for vocational retraining, but that plaintiff refused these offers. Defendant argued that if these offers had been accepted by plaintiff he would have returned to full gainful employment within one year after the date of the accident.

This being the case, the jury had before it evidence which allowed it to decide damages within a large range. Defendant argued for a very low damage figure and plaintiff requested over a million dollars. Such a dispute is a classic question for resolution by a jury. The court is satisfied that after seeing and hearing all witnesses, including plaintiff himself, that the jury's damage determination was supported by the evidence adduced at trial.

Plaintiff's second position is that the jury may have been confused by the court's inclusion in its instructions of the first paragraph of defendant's requested instruction number 33. That paragraph states that:

> With respect to loss of earnings in the past, you are instructed that if plaintiff could have worked in the past but did not, you must not award him damages for loss of earnings for the period of time during which he might have worked. The issue in this respect is not whether plaintiff did work but whether or not he could have worked doing all or any part of the time in question.

That paragraph was immediately followed by the following paragraphs.

> If you find that he could have worked, but at a lesser salary, because of his injury, his damages must be limited to the difference between the salary he might have earned and the greater amount which he could

> have earned if he had not been injured.
>
> Similarly, with respect to future loss of earnings, you are instructed that if plaintiff is to work in the future, but his earnings will be diminished because of his injury, he is entitled to recover the difference between the lesser salary he might earn and the greater amount which he could have earned if he had not been injured. The burden of proving the plaintiff could have worked in the past or will be able to work in the future is on the defendant.

The court remains of the opinion that this instruction, taken as a whole, accurately sets forth the law regarding plaintiff's duty to mitigate damages and is not so unclear as to be confusing. Plaintiff's motion for a new trial on damages based on a confusing jury instruction will therefore also be denied.

Prior to and during trial both the magistrate and the court encouraged the parties to attempt to compromise their dispute by way of settlement. The efforts of the court and counsel in that regard were unsuccessful and instead the parties chose to have the jury make the ultimate determination. The case was well tried by able counsel for both parties. The court is satisfied that a fair trial was afforded to the parties by the court and jury. Such being the case, a new trial on the issue of damages is not warranted.

Based on the foregoing, the briefs of the parties, and upon all files, records and proceedings had here,

IT IS HEREBY ORDERED That plaintiff's motion for a new trial on the issue of damages is DENIED.

DATED: June 13, 1990.

DONALD D. ALSOP
Chief U.S. District
Judge
September 6, 1991

A 0000008

APPENDIX B

Kyle SMALLEY, Appellant,

v.

The DULUTH, WINNIPEG & PACIFIC RAILWAY COMPANY, a Minnesota corporation, Appellee.

No. 90-5376

United States Court of Appeals, Eighth Circuit

Submitted Feb. 12, 1991

Decided July 22, 1991

* *

Employee brought action under Federal Employer's Liability Act. The United States District Court for the District of Minnesota, Donald D. Alsop, Chief Judge, entered judgment on jury verdict awarding employee $85,100 and denied employee's motion for new trial. Employee appealed. The Court of Appeals, Lay, Chief Judge, held that erroneous

jury charge regarding employee's inability to recover damages for loss of earnings if he could have but did not work following accident created genuine probability that jury's damages award was affected.

Reversed and remanded.

Arnold, Circuit Judge, concurred and filed opinion.

1. **Federal Courts**

Erroneous portion of jury instruction regarding employee's inability to recover damages for loss of earnings if he could have but did not work following his accident created genuine probability that jury's damages award was affected, even though another portion correctly stated law; there was overwhelming evidence that employee was

unable to work following his accident and that employer's suggestion that he could have worked was nothing more than that.

2. **Federal Civil Procedure**

All instructions must be read as a whole, and one erroneous instruction does not require reversal if error is corrected by subsequent instruction or by instructions in their entirety.

3. **Federal Civil Procedure**

If two or more conflicting statements of law are suggested, it cannot be presumed that jury followed proper rule.

Don C. Aldrich, argued (William G. Jungbauer and Patrick R. Gillespie, on brief), Minneapolis, Minn., for appellant.

Raymond L. Erickson, argued (Cheryl M. Richardson, on brief), Duluth, Minn., for appellee.

Before LAY, Chief Judge, and McMILLAN and ARNOLD, Circuit Judges.

LAY, Chief Judge.

This is a Federal Employer's Liability Act, 45 U.S.C. § 51 (1988), case in which the injured worker, Kyle Smalley, received an award for $85,100 against his employer, the Duluth, Winnipeg & Pacific Railroad Company which was found one hundred percent liable. The district court denied Smalley's motion for a new trial. Smalley asserts, on appeal, prejudicial error arising from an improper jury instruction on damages relating to past and future employment. We agree and reverse and remand for a new trial on damages only.

On July 11, 1985, Smalley, twenty-seven years old, fell on a loosely compacted landing area while dismounting from a train at the railroad's main switching yard in the Duluth, Minnesota, Superior, Wisconsin area. The yard had been undergoing reconstruction and renovation. Smalley lost his footing as he was dismounting and fell. He injured his knee, suffering traumatic chondromalacia, which required three operations.

[1] Smalley argues that one of the jury instructions erroneously directed the jury to award him nothing if he could have worked during the period in question. The instruction also told the jury to award him the difference between what he could have earned had he worked and what he had made in his prior job with the railroad. He asserts that the

jury was confused by the instruction which did not clarify which was the proper rule.[1] The erroneous instruction stated:

> With respect to loss of earnings in the past, you are instructed that if plaintiff could have worked in the past but did not, you must not award him damages for loss of earnings for the period of time during which he might have worked. The issue in this respect is not whether plaintiff did work but whether or not he could have worked

[1]The jury asked the court two questions while it was deliberating. "(1) Did the railroad lay Smalley off or was he fired or is he still employed? (2) Are they still covering his medical or has the company stopped any medical for Smalley?" Appellant's App. at 19.

The trial judge was not present at the time of the jury's interrogatories; the magistrate received the question for the court and declined to answer. The magistrate informed the jury it would have to follow the instructions and weigh all of the evidence it had received.

during all or any part of the time in question.

If you find that he could have worked, but at a lesser salary, because of his injury, his damages must be limited to the difference between the salary he might have earned and the greater amount which he could have earned if he had not been injured.

Similarly, with respect to future loss of earnings, you are instructed that if plaintiff is able to work in the future, you must not award him damages for future loss of earnings. However, if plaintiff is able to work in the future, but his earnings will be diminished because of his injury, he is entitled to recover the difference between the lesser salary he might earn and the greater amount which he could have earned if he had not been injured. The burden of proving that plaintiff could have worked in the past or will be able to work in the future is on the defendant.

It is undisputed that the first portion of the instruction is obvious error. Jones v. Consolidated Rail Corp.,

800 F.2d 590, 594 (6th Cir. 1986); Felder v. Union Pac. R.R., 660 P.2d 911, 914 (Colo.Ct.App. 1983); Hays v. Pennsylvania R.R., 19 Ill.App.2d 368, 371-73, 153 N.E.2d 737, 739 (1958). However, the issue is whether the following portion of the instruction corrects the error. The second portion of the instruction on diminished earning capacity is, of course, correct. Jones, 800 F.2d at 594.

[2, 3] We are reminded that all instructions must be read as a whole, and one erroneous instruction does not require reversal if the error is corrected by a subsequent instruction or by the instructions in their entirety. Davis v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 906 F.2d 1206, 1212 (8th Cir. 1990); Wright v. Farmer's Co-op of Ark. & Okla., 620 F.2d 694, 697 (8th Cir.

1980). At the same time, we also follow the general proposition that if two or more conflicting statements of law are suggested, it cannot be presumed that the jury followed the proper rule. Johnson v. Bryant, 671 F.2d 1276, 1281 (11th Cir. 1982); see also, Pate v. Seaboard R.R., 819 F.2d 1074, 1080-81 (11th Cir. 1987) (finding jury possibly misled by passenger contributory negligence charge in light of entire charge, parties' contentions, and evidence presented); Somer v. Johnson, 704 F.2d 1473, 1478 (11th Cir. 1983) (finding charge invited jury to make impermissible alternative findings); Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981) (requiring new trial when uncertain whether jury actually was misled).

We evaluate the effect of error in instructions in light of the record as a whole. Rosebud Sioux Tribe v. A & P Steel, Inc., 733 F.2d 509, 517 (8th Cir.), cert. denied, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984). On this basis, we have reviewed the verdict in light of the parties' contentions, the evidence, and the entire charge.

At the trial, doctors testified that Smalley was permanently injured and could not work at his prior railroad job as a switchman. Dr. Mark Carlson, an orthopedist, testified that Smalley was restricted permanently from activities that required bending, stooping, or lifting more than twenty pounds. He also testified that Smalley was "permanently disabled from returning to his previous type of job with the railroad."

Dr. Robert Wengler, an orthopedist, testified that Smalley was still having pain in his knee after the surgeries and that he also was having some lower back problems and pain in his right leg. He also testified that the back problems and leg pain probably resulted from an altered gain caused by limping on the right leg. Dr. Wengler testified that Smalley's back problems would have an impact on his future activities, especially in the labor market. He testified that Smalley had permanent restrictions on his activities because of his knee and back problems. He stated that Smalley should not engage in activities requiring repetitive bending, stooping, or twisting of the back, or requiring heavy pushing or pulling,

kneeling, or lifting more than twenty to twenty-five pounds.

Dee Koskela, a vocational rehabilitation consultant, testified that the restrictions on Smalley's physical activities limited the type of work he could do. She also testified that Smalley's intellectual capacity had been tested and he was found to be borderline mentally retarded. He quit school in the eleventh grade and could read only at the fifth grade level. Koskela testified that Smalley's employment options were restricted because of his physical and intellectual limitations and his few transferable job skills. Smalley had few transferable job skills because he had only worked for the railroad. She testified that he would be able to perform only menial labor because of his

physical, mental, and educational limitations. She testified that the best job Smalley could get would be "an entry level unskilled job that he can learn with a short demonstration, without a lot of changes." She believed that such a job would pay between $4.00 and $4.50 an hour.

Smalley's economist testified that Smalley had a past economic loss of $123,000 and future losses of over $795,000, deducting for a minimum wage job, after taxes, and reduced to present value. The economist assumed Smalley would work for the railroad until he reached the age of sixty-five. The railroad testified that Smalley was guaranteed $3,000 a month for up to ten years, under a collective bargaining agreement, if he was physically able to

work. The railroad asserted, however, that Smalley would only be eligible for the $36,000 a year for ten years if he had lost his job because of the railroad's relocation of its operations from Minnesota to Wisconsin. There was no evidence that Smalley qualified for these benefits. The railroad asserted that it offered Smalley special light duty work and also offered to retrain him but he refused.[2] The railroad testified

[2]After his accident, Smalley worked for the railroad driving a van transporting crews and weigh bills to various locations for two days. He had to quit because he was having trouble with his knee. The railroad discussed other types of possible employment with Smalley after doctors told Smalley he probably would never be a train man again. There was some discussion about Smalley becoming an engine man but he was not interested. The railroad testified that Smalley said "if he could not be out

(Footnote Continued)

that Smalley also refused assistance in finding alternative employment. The railroad argues that Smalley's economist did not take into account employment opportunities Smalley refused, his educational background, his capacity for retraining, or other economic factors. Smalley was unable to keep any of the manual labor type jobs he got because of his injuries.[3]

(Footnote Continued)
doing the type of work that he loved to do, being a train man, he felt it would be very difficult to do anything else on the property, so he was not desirous of any other position on the railroad." The railroad testified that it offered Smalley vocational testing services or testing on two occasions but he was not receptive.

[3]The parties stipulated that Smalley earned either $2,948.00 or $3,668.00 in employment income from 1985 to the time of trial. Compare Appellee's Brief at 3 with Tr. 122 III at 7.

We find the overwhelming medical evidence supports Smalley's disability and inability to work. The railroad's suggestion that Smalley could have worked is nothing more than a suggestion. Although the jury was entitled to weigh all of the evidence, a reading of the record establishes there is little evidence to find that Smalley could have been retrained for other employment or that he was capable of working at other jobs. The inadequacy of the verdict strongly suggests that the jurors believed that since he could have worked or been retrained for another job, he was entitled to no compensatory damages.

Applying the instructions in their entirety is basic to our evaluation. When there exists, however, internal contradiction or inconsistency, courts

should not presume the jury understood the proper rule and rejected the erroneous rule. As judges, we know the second part of the rule is the correct statement of law. We also know, as judges, that the first portion is clear error. If we were sitting as the jury, we would undoubtedly apply the proper rule. The question remains, however, would a lay jury? Although the district court discussed mitigation of damages with the jury when it read the instructions to the jury, we are uncertain that the jury followed the proper rule. There is a genuine probability, created by the instruction in this case, that the jury was misled to Smalley's detriment. See Somer, 704 F.2d at 1478. Because the jury might have possibly employed the wrong criteria, the error was not

harmless and a new trial is required on the issue of damages. See Johnson, 671 F.2d at 1281; Pate, 819 F.2d at 1080-81. We find in the interests of justice that Smalley is entitled to a new trial on the issue of damages. Reversed and remanded.

ARNOLD, Circuit Judge, concurring.

I join the Court's opinion and desire to add only a few words. The major argument in support of affirmance in this case is that the instruction, when read as a whole, is not incorrect, or at least would not likely be misunderstood by a reasonable juror. This is a strong argument, and it has made me hesitate as to the proper result on this appeal.

In the end, however, I think the Court is doing the right thing. The

amount of money awarded by the jury here indicates fairly clearly that it thought the plaintiff should have accepted the railroad's offer to employ him as an engine man. The trouble with this approach is that the record contains no evidence of what an engine man would have been paid. If the record showed that an engine man would have made the same as Smalley had been paid as a train man before the accident, the jury's verdict would be well grounded, and we could be sure that the arguably erroneous instruction had no effect. But as things turned out, it seems likely that the jury really though that Smalley's refusal of the offer of re-employment was an absolute bar to any further damages, regardless of what he would have earned if he had accepted the offer.

For these reasons, I conclude that the jury probably understood the instruction in the wrong way, and that a new trial on damages is the proper result.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 90-5376MN

Kyle Smalley,

Appellant,

vs.

The Duluth, Winnipeg & Pacific Railway Company, etc.,

Appellee.

ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

Suggestion for rehearing en banc filed by appellee has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judge Fagg, Judge Wollman, Judge Magill and Judge Beam voted to grant rehearing.

Petition for rehearing is also denied.

September 6, 1991

Order Entered at the Direction of the Court:

Clerk, U.S. Court of Appeals, Eighth Circuit.

DISTRICT COURT OF THE UNITED STATES
DISTRICT OF MINNESOTA
FIFTH DIVISION

Kyle Smalley,

Plaintiff,

vs.

The Duluth, Winnipeg & Pacific Railway Company, a MN corporation

Defendant.

No. 5-88-23 Civil

CLERK'S NOTICE UNDER F.R.C.P. RULE 77d F.R.C.P. RULE 49(c)

You are hereby notified that in the above entitled cause, on the 30th day of September, 1991, we filed CERTIFIED COPY OF OPINION AND JUDGMENT OF THE U. S. COURT OF APPEALS FOR THE EIGHTH CIRCUIT that the judgment of the District Court is reversed and the cause is remanded to the District Court for proceedings

consistent with the opinion of the U. S. Court of Appeals for the Eighth Circuit.

(Mandate Issued 9/26/91)

FRANCIS E. DOSAL, CLERK

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Supreme Court, U.S.
FILED
DEC 26 1991
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(2)

No. 91-893

In the Supreme Court of the United States

October Term, 1991

THE DULUTH, WINNIPEG & PACIFIC RAILWAY COMPANY, a Minnesota corporation,
Petitioner,

v.

KYLE SMALLEY,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Petitioner-Defendant Duluth, Winnipeg & Pacific Railway Company [hereinafter DWP] misrepresents the record below. Pursuant to Supreme Court Rules 15.1 and 24.2, Respondent-Plaintiff Kyle Smalley will confine himself to correcting these inaccuracies.

There was no "conflicting testimony regarding the nature and extent of Smalley's injuries" [DWP Petition at 5]. DWP confined its evidence at trial to liability. It presented no medical evidence or testimony, nor any testimony concerning Mr. Smalley's injuries, rehabilitation efforts or vocational possibilities.

The *only* doctors who testified *both disqualified* Mr. Smalley from working at his old job, and stated his injuries were permanent (Dr. Wengler Deposition at 28;

Dr. Carlson at 3, 7/20-25, 11/17-24, 13/18-23). These permanent injuries resulted in restrictions placed on his physical activity in the workplace, and disabled him from working for DWP. No one testified to the contrary.

Furthermore, Mr. Smalley did not make "general claims of unemployability" [DWP at 5], nor did he try to prove that he could never do any type of work. Indeed, his economist, Dr. Egge, subtracted from his calculations those amounts Mr. Smalley had earned prior to trial, and deducted for future earnings [Egge 27/7-13]. DWP presented no economic testimony.

There was no evidence of any kind that DWP had offered Mr. Smalley a job [DWP at 6]. As the Court of Appeals noted, there was a <u>suggestion</u> that such a job might be available, but there was never any testimony as to what it paid or whether

Mr. Smalley was physically capable of performing it. In point of fact, when Mr. Smalley's vocational rehabilitation counselor contacted DWP about job possibilities, she was told none were available.

Nor did Mr. Smalley's vocational counselor testify "that at least one of the tests disclosed that Mr. Smalley was exaggerating his symptoms" [DWP at 7]. This comment was in a note from the doctor who conducted an MMPI exam, and was labeled "extremely tentative." The counselor, Ms. Koskela, actually testified that the score indicated an extreme level of depression and difficulty with dealing with the physical limitations imposed by the injury [Koskela at 43/3-24].

Finally, Mr. Smalley did not claim that he was guaranteed $3,000 a month if he was injured. The guarantee was good only if

he were to lose his job because of the worsening economic conditions cited by Mr. Wollack. The point was that if Mr. Smalley had not been injured, he had a minimum, guaranteed wage of $360,000 for the next ten years in spite of the DWP's claims that he might have lost his job even without injury.

The uncontroverted damages evidence adduced at trial was that Mr. Smalley was permanently injured, that those injuries disqualified him from railroad service, and that his lack of education and limited abilities precluded him from all but menial labor.

The jury award of $85,100 was less than his past wage loss alone.

ARGUMENT

DWP misconstrues the Appellate Court's decision as reversing on the grounds of sufficiency of the evidence or inadequacy of the verdict. These grounds were not advanced on appeal, nor were they the basis for the decision.

The Trial Court made an error of law in its instructions to the jury. When the jury has been misinstructed, the reviewing court must examine the verdict in the light of the record as a whole. If, based on the verdict and the evidence, it appears the jury may have been misled by the instructions, the verdict must be reversed.

In the instant case, the Appellate Court found the evidence of Mr. Smalley's injuries and damages to be uncontroverted and overwhelming. Given that the jury had found DWP 100% liable, and an award less

than his past wage loss alone, the Court found it not only possible, but likely that the jury was misled by the incorrect instructions on mitigation of damages. A new trial on the issues of damages alone was necessary.

DWP's claim that the Appellate decision was anything else is disingenuous. It's arguments concerning a conflict in the circuits on inadequate jury verdicts are not germane to the case as decided by the Eighth Circuit.

There are simply no constitutional issues or questions of national import requiring review by this Court.

I. THE EIGHTH CIRCUIT GRANTED A NEW TRIAL BECAUSE THE TRIAL COURT ERRED IN ITS JURY INSTRUCTIONS

Petitioner-Defendant Duluth, Winnipeg & Pacific Railway Company claims the Court of Appeals reversed the damages verdict based on a "sufficiency of the evidence"

standard [DWP Petition at 21-22]. The analysis set forth by the Appellate Court was not to determine if the evidence was sufficient to support the verdict, but rather to determine if the erroneous instruction was harmless error.

A. The Trial Court's Instruction on Mitigation of Damages Was a Serious Mistake of Law

The Trial Court gave DWP's requested jury instruction on mitigation of damages:

> With respect to loss of earnings in the past, you are instructed that if plaintiff could have worked in the past, but did not, you must not award him damages for loss of earnings for the time during which he might have worked. The issue in this respect is not whether plaintiff did work but whether or not he could have worked during all or any part of the time in question. Smalley v. Duluth, Winnipeg & Pacific Ry. Co., 297 F.2d 296, 297 (8th Cir. 1991).

The instruction on future damages made the same misstatement of law:

> Similarly, with respect to future loss of earnings, you are

> instructed that if plaintiff is able to work in the future, you must not award him damages for future loss of earnings, Id.

Under the rule of mitigation of damages, a jury reduces its award by the difference between the actual damage incurred and the amount that could have been avoided by reasonable efforts. See Restatement of Torts, Second, §918, comment (a). The instruction to deny damages completely is simply wrong as a matter of law:

> The precise error commented upon in Hays [Hays v. Pennsylvania R.R., 19 Ill. App. 2d 368, 153 N.E.2d 737,739 (1958)], and involved in the jury instruction tendered here, is that the Hays' jury was instructed that the plaintiff could not recover damages for any period for which the plaintiff might have worked in the past or might work in the future. This is an incorrect statement of law, and thus, the railroad was not entitled to such an instruction. Felder v. Union Pacific R.R., 660 P.2d 911, 914 (Colo. App. 1982).

The instruction was found to be capable of misleading and misinforming the jury, thereby constituting reversible error. Id.

The Appellate Court's comment that, "It is undisputed that the first portion of the instruction is obvious error", Smalley, supra. at 297, did not, as DWP suggests, mean that either DWP or the District Court agreed; obviously, they did not. Rather, it is recognition that **every court** that has passed on this instruction has held it reversible error.

B. Jones v. Conrail Reversed a Jury Trial Because of this Very Instruction

DWP claims that, "Recently, the United States Court of Appeals for the Sixth Circuit upheld a similarly worded instruction. Jones v. Conrail, 800 F.2d 590, 594 (6th Cir. 1986)" [DWP Petition at 35].

The Jones instruction was not only similarly worded, it is identical save for the term "whatever" preceding the word earnings in line 4. Jones, supra. at 593. Contrary to DWP's contention, the Jones court found this constituted reversible error:

> [T]he charge did not adequately inform the jury that the plaintiff was entitled to the difference between what he would have earned on the railroad and what he might have earned in another position. Because this may have affected the award of damages, it is also reversible error. Jones, supra. at 594.

It is not coincidental that the same erroneous instruction continues to surface in FELA cases. While no citation to authority was provided for the instruction as tendered, at oral argument DWP admitted it was taken from a handbook published by the National Association of Railroad Trial

Counsel, an FELA defense counsel association.

C. When Two Conflicting Statements of Law Are Given, It Cannot Be Assumed the Jury Will Apply the Proper Rule

DWP argues that the jury instructions, read as a whole, correctly stated the law [DWP Petition at 33]. In reality, the Trial Court gave internally inconsistent instructions--first, the jury is told to award Mr. Smalley nothing if it finds he could have worked in the past, and did not; then it is told to award him the difference between what he could have made and what he did make. Smalley, supra. at 297. The same two contradictory statements were made concerning future earnings. Id.

When conflicting statements of law are given to the jury, with no guidance as to which is the correct statement, it cannot be assumed that the jury applied the correct law in reaching its decision.

Johnson v. Bryant, 671 F.2d 1276, 1281 (5th Cir. 1982). Faced with error by the Trial Court, the Appellate Court then had to determine if it was harmless error.

D. To Determine Whether an Erroneous Jury Instruction Misled the Jury, the Reviewing Court Must Examine the Evidence

A Court of Appeals reviews a jury instruction that misstates the law, or may mislead the jury, to determine whether there was a reasonable chance the jury was confused. Connecticut Mutual Life Ins. Co. v. Wyman, F.2d 63, 65 (3rd Cir. 1983); Miller v. Universal City Studios, Inc., 650 F.2d 1365, 1372 (5th Cir. 1981). The law requires the reviewing court to evaluate the verdict in the light of the evidence. Hallberg v. Brasher, 679 F.2d 751, 758 (8th Cir. 1982)["Furthermore, the error should be evaluated in light of the verdict"].

The Appellate Court correctly stated its duty under the circumstances:

> We evaluate the effect of error in instructions in light of the record as a whole. Rosebud Sioux Tribe v. A&P Steel, Inc., 733 F.2d 509, 517 (8th Cir.), cert. denied, 469 U.S. 1072 (1984). On this basis, we have reviewed the verdict in light of the parties' contentions, the evidence, and the entire charge [Emphasis Added]. Smalley, supra., at 298.

The Court then analyzed the factual record, and found, "The inadequacy of the verdict strongly suggests that the jurors believed that since he could have worked or been retrained for another job, he was entitled to no compensatory damages." Id.

Thus, the analysis of the evidence was not, as DWP asserts, performed to weigh its sufficiency, but to determine whether the erroneous jury charge may have influenced the verdict. As the evidence of Mr. Smalley's damages was so overwhelming and almost uncontroverted, all three judges

agreed the possibility was too high to permit the damages verdict to stand.[1]

II. CONCLUSION

In its attempt to secure review, DWP misrepresents the record of the trial. DWP concentrated on the liability issue at trial. It introduced no medical testimony, nor did it present an expert to testify about Mr. Smalley's vocational skills, possibilities, or his claimed economic loss. It introduced no evidence of any job offers or possibilities for Mr. Smalley.

DWP equally mischaracterizes the Appellate Court's decision. The Trial Court misinstructed the jury, giving DWP's requested instruction on mitigation of damages. When faced with an error of law

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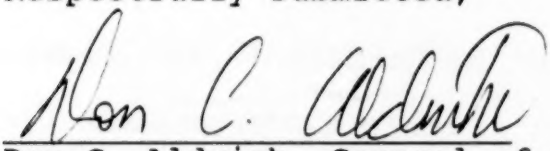
[1] Indeed, in his concurring opinion, Judge Arnold concluded that not only was it possible the jury misunderstood the law as a result of the instruction, it was probable. Smalley, supra., concurring opinion at 298.

in the jury instructions, the reviewing court must review the verdict in the light of the record as a whole to determine if the error was harmless or requires reversal. Faced with the overwhelming evidence of Mr. Smalley's physical disability, the Court concluded not only was it possible the jury had been misled, it was probable. The granting of the new trial on the issue of damages was required on the record before it.

There are simply no constitutional issues or questions of national import requiring review by this Court.

For the reasons set forth above, Respondent Kyle Smalley respectfully requests DWP's Petition for Certiorari be denied.

Respectfully Submitted,



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